SUPREME COURT, U. S.

JAN 6 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1967

No. 895

PAUL C. WETTER, et al.,

Appellants,

v.

CITY OF INDIANAPOLIS, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLEES' MOTION TO DISMISS OR AFFIRM AND STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION

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The City of Indianapolis, et al, Appellees, respectively move that this appeal be dismissed; or, alternatively, that the judgment of the Supreme Court of Indiana be affirmed for the reasons that:

1. This appeal does not present a substantial federal question.

2. The decision of the Indiana Supreme Court is correct.

In support of this motion, the following statement is submitted:

I.

FACTUAL STATEMENT

This action is an attempt by a few individuals to obtain a judicial ruling that the State of Indiana and its municipal agent, the City of Indianapolis, are perpetually prohibited from utilizing a tract of land in the middle of Indianapolis for any public purpose other than as a site for a market.

The material, historical facts are contained in the opinion of the Indiana Supreme Court and are:

> "The title to the tract in particular and to the area now occupied by the City of Indianapolis was ceded to the United States by Indians in a treaty of St. Mary's, Ohio. By virtue of an Act of Congress approved March 3, 1819 and an Act of the Indiana General Assembly approved January 11, 1820, commissioners were appointed to select land as a permanent site of government of the State of Indiana. The commissioners were authorized to lay out and plat one section of land of one square mile as the initial site of a town to be called Indianapolis, which original plat, as finally prepared, was approved by an act of the General Assembly on January 6, 1821. . . . The plat was filed in the Secretary of State's office in June, 1821. This plat is made an exhibit in this case, and we find thereon the South Half of Lot or Square 43 designated 'Market' and subsequent plats thereafter as 'Market Square', 'City Market'. We also find on the plat a site in the middle of what is known as Circle Street marked 'Governor's Circle' which is

now occupied by the Soldiers and Sailors Monument, a spot marked 'Court House' which is now occupied by the City-County Building, a place marked 'University Square' which is now used as a park. We also find on the plat the South Half of Square 50 marked 'Market' which is also known as 'West Market Square, to distinguish it from the Market Square with which we are here concerned, which is also known as 'East Market Square'. With reference to the latter site (West Market Square, South Half of Square 50), we are informed by the briefs that this was never used as a market site and in 1837 was taken over for the new Central Canal, which is still located there. We are also informed that this West Market Square site was exchanged with the State of Indiana for the North Half of Square 48, and the State in the deed referred to it as 'a market space'. This market space or market site was used for a short time as a second market on the west side and later was taken over again by the State of Indiana, and is part of the ground upon which the State Capitol is now located and is the ground referred to in what is known as the *Ketcham Case (The President, &c., v. The City of Indianapolis* (1859), 12 Ind. 620), of which case we shall have more to say later in this opinion.

It will be noted, therefore, as a historical fact, that there have been various sites and tracts of land within the City of Indianapolis that have been designated by the State of Indiana through deeds or plats for certain public purposes at the time and which, through the years, have been changed and altered as to their public use.'" *Wetter v. City of Indianapolis* (1967), 226 N. E. 2d 886, on pages 887-888.

In recent years, public officials and interested citizens have proposed new improvements for the land in question. These proposals have been based in part on the fact that the existing market was operating at a deficit imposing

a tax burden on the community, on the fact that health and sanitation problems were created by the existing market operation, and because the land use needs of a metropolitan area in the middle of the twentieth century are not those of an 1821 agricultural society. To eliminate any question of authority, as between the State of Indiana and the City of Indianapolis, to determine the proper use of the site, the Indiana legislature adopted an act authorizing the Governor to convey all interest of the State in the site to the City of Indianapolis. This was accomplished and a deed executed. The Appellants' action challenges the validity of this legislation and the deed. Both the trial court which heard the case and the Indiana Supreme Court rejected the Appellants' contentions and determined that the City of Indianapolis has the right to utilize the land in question for any public purpose.

II.

DECISION OF THE COURT BELOW

The decision of the Indiana Supreme Court, after summarizing the pertinent facts on the history of the land in question, as set forth above, held:

> "The appellants rely to a large extent on cases and quotations setting up charitable trusts by private individuals who donate their private property to some public agency for that purpose. We do not feel these cases are analogous to the present situation. *Here the property in question was owned originally by the public and simply donated for a public use without the words 'irrevocably' or 'in perpetuity' being used.* There is no semblance of the creation of a trust in the mere transfer of property by a state to one of its agencies for some public use. The designation by the state or one of its instrumentalities of any particular property for a public or governmental use does not

create contractual rights in the public to insist upon such use being made 'irrevocable' and 'in perpetuity'. Under the principles advocated by the appellants in this case a state or its governmental agency would put itself in a straight jacket and tie its hands in the use of such public property as it may possess for all future purposes, regardless of changing times. Such a principle would violate sound public policy.

Appellants emphasize the word 'dedicated'. It does not, in our judgment, have by necessary implication the legal significance of 'irrevocable' and 'in perpetuity'. Generally speaking, we 'dedicate' a bridge, park, public auditorium or other governmental works to the purpose for which they were constructed. Yet this does not mean that they are placed irrevocably and in perpetuity to such purpose and use and that the state has lost control thereafter to alter such use as time and change require." (Emphasis added.) *Wetter v. City of Indianapolis* (1937), 226 N. E. 2d 886, on pages 888-889.

III.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE ATTEMPTED APPEAL

The Indiana Courts have simply held that, under the facts in this case, the State or its agent, the City of Indianapolis, may alter the use of public property. The decisions of the Courts below are manifestly correct and under no circumstances could be construed as impairing any contractural obligations within the meaning of the Constitution of the United States. The federal government, the state governments and the numerous local governmental entities throughout this country frequently change the use to which various parcels of public property are put. Property once used as a street may have to be vacated for expansion of an airport. An old canal once dedicated for

transportation may properly become part of a recreational area; or, as this Court has held, a part of a park may properly be used for a fire station.

Reichelderfer v. Quinn (1932), 287 U. S. 315, 53 S. Ct. 177, 77 L. Ed. 331, rejected a constitutional challenge to federal legislation directing construction of a fire station on a part of a tract originally dedicated to park purposes by earlier Congressional legislation. Admittedly the Constitutional challenge was not on the basis of state action impairing the obligation of contract. However, the express claim was made that the action would constitute a taking without payment of just compensation to neighboring property owners in violation of the Fifth Amendment. In rejecting this argument, the opinion by Justice Stone states on page 317, et seq., of the U. S. Reports:

> "For present purposes we assume that the proposed building will divert the land from park uses, and address ourselves to the question upon which the other issues in the case depend, whether the respondents, plaintiffs in the trial court are vested with the right for which they invoke constitutional protection.
>
> ". . . it is argued that the right asserted, whether it be regarded as arising from a contract with the government or an interest in its lands, has a definite source in the transaction by which the park was created.
>
> . . . The respondents derived no rights against the government from the dedication of the park alone. . . By dedicating the lands thus acquired to a particular public use, Congress declared a public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses. The dedication expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years. . . It is true that the mere presence of the park may have conferred a spe-

> cial benefit on neighboring owners and enhanced the value of their property. But the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority . . . or a street grade is raised, . . . or the location of a county seat, . . . or of a railroad is changed . . . but in such cases no private right is infringed.
>
> . . . Thus construed, the dedication of the park, a declaration of a present purpose, does not imply a promise to neighboring land-owners that the park would be continued in perpetuity."

The opinion clearly rejects the contention that the neighboring property owners, much less the public generally, have a constitutionally protected property or contract right to a particular use for public property.

By definition, there can be no impairment of a contractural obligation unless there is a basis for finding a contractural obligation. As stated by this Court in *Keefe v. Clark* (1944) 322 U. S. 393, 88 L. ed. 1346, 64 S. Ct. 1072:

> "Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed."

The Supreme Court of Indiana noted in its opinion there was no factual basis to support a determination that the State of Indiana had made an irrevocable committment to utilize the property in question as a city market. In

the absence of a factual basis for such a committment, there is no basis for the finding of a contractural obligation which would be impaired by a change in public use of the property in question.

The major judicial authority cited by Appellants' is the decision in *Trustees of Dartmouth College v. Woodward* (1819), 4 Wheaton 518, 4 L. Ed. 629. That decision simply held that a charter granted by the English Crown to certain specified individuals to act as a body corporate did constitute a contract within the constitutional provisions. The holding in that case cannot be extended to create contracts with the general public for every dedication of public property for a certain use. Appellants' have cited no authority, state or federal, that extends that far. The authorities are in fact to the contrary. See:

Carson v. State (1949), 240 Iowa 1178, 38 N. W. 2d 168;

Lowell v. City of Boston (1948), 322 Mass. 709, 79 N. E. 2d 713;

McQuillin Municipal Corporations, Sec. 33.74 (3rd Ed. Revised), states:

"Where, however, the dedication is made by the state, the intention of the state controls the use, and the state may change the original use for other public uses. And, furthermore, where the public as distinguished from a private owner, is the dedicator the grant generally speaking will be deemed to be unrestricted . . ."

WHEREFORE, Appellees respectfully move that the within appeal be dismissed or, alternatively, that the judgment and decision of the Supreme Court of the State of Indiana be affirmed.

Respectfully submitted,

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